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House Bill _____
By _____

Senate Bill No.SB0377
By Kyle

AN ACT to amend Tennessee Code Annotated, Section 40-26-105 and Title 40, Chapter 30, to enact the "Post-Conviction Procedure Act".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 40, Chapter 30 is amended by deleting the chapter in its entirety and by substituting instead the following:

§ 40-30-101. Short title.--This chapter may be referred to as the "Post-Conviction Procedure Act."

§ 40-30-102. When prisoners may petition for post-conviction relief.--(a) Except as provided in subsection (b), a person in custody under a sentence of a court of this state must petition for post-conviction relief under this chapter within three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within three (3) years of the date on which the judgment became final, or consideration of such petition shall be barred.

(b) If the claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction, or a death sentence was imposed in whole or in part upon a

previous conviction, and if the previous conviction has subsequently been held to be invalid, the petition may be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

(c) If the claim asserted in the petition seeks relief based on a ground for which the tolling of the statute of limitations is required under the federal or state constitutions, then the petition may be filed within the time established by the court for doing so.

(d) The time limitations set forth in this section shall not be tolled for any reason, except as provided in subsections (b) and (c) of this section.

§ 40-30-103. Grounds for relief.--(a) Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the constitution of this state or the Constitution of the United States.

§ 40-30-104. Petition.--(a) A post-conviction proceeding is commenced by filing with the clerk of the court in which the conviction occurred a written petition naming the State of Tennessee as the respondent. No filing fee shall be charged.

(b) The petitioner shall provide all information required by this section. Petitions which are incomplete shall be filed by the clerk, but shall be completed as set forth in an order entered in accordance with § 40-30-106(d).

(c) The petition for post-conviction relief shall be limited to the assertion of claims for relief from the judgment or judgments entered in a single trial or proceeding. If the petitioner desires to obtain relief from judgments entered in separate trials or proceedings, he must file separate petitions.

(d) The petitioner shall include all claims known to him for granting post-conviction relief and shall verify under oath that he has done so.

(e) The petitioner shall include allegations of fact supporting each claim for relief set forth in the petition and allegations of fact explaining why each ground for relief was not previously presented in any earlier proceeding. The petition and any amended petition shall be verified

under oath. Affidavits, records or other evidence available to the petitioner supporting the allegations of the petition may be attached to it.

(f) The petitioner shall provide the name of any attorney licensed to practice law who drafts or has given assistance or advice regarding drafting the petition for post-conviction relief.

(g) Amendments to the petition shall conform substantially to the form for original petitions, except that matters alleged in the original petition need not be repeated.

§ 40-30-105. Processing of petitions--designation of judge.--(a) When in receipt of a petition applying for post-conviction relief, the clerk of the trial court shall forthwith:

- (1) Make three (3) copies of the petition;
- (2) Docket and file the original petition and its attachments;
- (3) Mail one copy of the petition to the attorney general and reporter in Nashville;
- (4) Mail or forward one (1) copy of the petition to the district attorney general;
- (5) Mail or forward one (1) copy to petitioner's original attorney; and
- (6) Deliver the petition, its attachments, and all available files, records, transcripts, and correspondence relating to the judgment under attack to the judge for preliminary consideration.

(b) At either the trial proceeding or an appellate proceeding reviewing the proceeding, the presiding judge of the appropriate court shall assign a judge to hear the petition. The issue of competency of counsel may be heard by a judge other than the original hearing judge. If a presiding judge is unable to assign a judge, the Chief Justice of the Supreme Court shall designate an appropriate judge to hear the matter.

(c) A petition for habeas corpus may be treated as a petition under this chapter when the relief and procedure authorized by this chapter appear adequate and appropriate, notwithstanding anything to the contrary in Tennessee Code Annotated, Title 29, Chapter 21, or any other statute.

§ 40-30-106. Preliminary consideration.--(a) The trial judge to whom the case is assigned shall, within thirty (30) days of the filing of the original petition, or a petition amended

in accordance with subsection (d) of this section, examine it together with all the files, records, transcripts, and correspondence relating to the judgment under attack, and enter an order in accordance with the provisions of this section or § 40-30-107.

(b) If it plainly appears from the face of the petition, any annexed exhibits or the prior proceedings in the case that the petition was not filed in the court of conviction or within the time set forth in the statute of limitations, the judge shall enter an order dismissing the petition. The order shall state the reason for the dismissal and the facts requiring dismissal. If the petition is dismissed as untimely, the order shall state or the record shall reflect the date of conviction, whether an appeal was taken, the name of each court to which an appeal was taken, the date of the final action by each appellate court, and the date upon which the petition was filed.

(c) If it appears that a post-conviction petition challenging the same conviction is already pending in either the trial court, Court of Criminal Appeals, or Supreme Court, the judge shall enter an order dismissing the subsequent petition. The order shall state the style of the pending petition and in which court it is pending.

(d) If the petition does not conform to the form annexed to these rules or does not set forth all information required by said form, including necessary allegations of fact and the petitioner's verifications under oath, the court shall note the specific deficiency or omission and shall enter an order stating that the petitioner must file an amended petition containing the required information within fifteen (15) days or the petition will be dismissed. The amended petition shall be examined by the judge to whom it is assigned for preliminary consideration under this section.

(e) If a petition amended in accordance with subsection (d) of this section is incomplete, the court shall determine whether the petitioner is indigent and in need of counsel. The court may appoint counsel and enter a preliminary order if necessary to secure the filing of a complete petition.

(f) Upon receipt of a petition in proper form, or upon receipt of a petition amended in accordance with subsection (d) of this section, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court's conclusions of law.

(g) A ground for relief is waived if the petitioner or his attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) the failure to present the ground was the result of attorney error at the original trial or on direct appeal rising to the level of ineffective assistance of counsel;

(2) the claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the state or federal constitution requires retroactive application of that right; or

(3) the failure to present the ground was the result of state action in violation of the federal or state constitution.

(h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.

(i) If the petition is not dismissed pursuant to this rule, the court shall enter a preliminary order as provided in § 40-30-107.

§ 40-30-107. Preliminary order.--(a) If the petition is not dismissed upon preliminary consideration, the court shall enter a preliminary order.

(b) In all cases, the preliminary order shall direct the following:

(1) If a petitioner not represented by counsel requests counsel and the court is satisfied that the petitioner is indigent as defined in § 40-14-201, the court shall appoint counsel to represent the petitioner.

(2) If counsel is appointed, counsel must file an amended petition or a written notice that no amendment will be filed within thirty (30) days, unless extended for good cause. The written notice shall state that counsel has consulted the petitioner and that the petitioner agrees that there is no need to amend the petition. The district attorney general shall file an answer or other responsive pleading within thirty (30) days of service of the amended petition or the notice, unless extended for good cause. Good cause will not be met by a routine statement that the press of other business prevents a response within the thirty-day period.

§ 40-30-108. Answer or response.--(a) The district attorney general shall represent the state and file an answer or other responsive pleading within thirty (30) days, unless extended for good cause. Good cause will not be met by a routine statement that the press of other business prevents a response within the thirty (30) day period.

(b) If the petition does not include the records or transcripts, or parts of records or transcripts that are material to the questions raised therein, the district attorney general is empowered to obtain them at the expense of the state and shall file them with the responsive pleading or within a reasonable time thereafter.

(c) The district attorney general may at such general's option assert by motion to dismiss that:

- (1) The petition is barred by the statute of limitations;
- (2) The petition was not filed in the court of conviction;
- (3) The petition asserts a claim for relief from judgments entered in separate trials or proceedings;
- (4) A direct appeal or post-conviction petition attacking the same conviction is currently pending in the trial or appellate courts;
- (5) The facts alleged fail to show that the petitioner is entitled to relief; or

(6) The facts alleged fail to establish that the claims for relief have not been waived or previously determined.

(d) The answer shall respond to each of the allegations of the petition and shall assert such affirmative defenses as the district attorney general deems appropriate.

§ 40-30-109. Prehearing procedure.--(a) The court shall review the case after the district attorney general's response is filed. If, on reviewing the petition, the response, files, and records, the court determines conclusively that the petitioner is entitled to no relief, the court shall dismiss the petition. The order of dismissal shall set forth the court's conclusions of law. If the court determines that an evidentiary hearing is needed, the judge shall enter an order setting one as expeditiously as possible.

(b) Discovery is not available in a proceeding under this section except as provided under Rule 16 of the Tennessee Rules of Criminal Procedure.

§ 40-30-110. Hearing.--(a) The petitioner shall appear and give testimony at the evidentiary hearing if his petition raises substantial questions of fact as to events in which he participated, unless the petitioner is incarcerated out of state, in which case the trial judge may permit the introduction of an affidavit or deposition of the petitioner and shall permit the state adequate time to file any affidavits or depositions in response it may wish.

(b) (1) If the petitioner is imprisoned, the warden shall arrange for transportation of the petitioner to and from the court upon proper orders issued by the trial judge.

(2) The sheriff of the county where the proceeding is pending shall have the authority to receive and transport the petitioner to and from the penitentiary and the court, if the court so orders or if for any reason the warden is unable to transport him. The sheriff shall be entitled to the same costs allowed for the transportation of prisoners as is provided in criminal cases upon the presentation of the account certified by the judge and district attorney general.

(c) Proof upon the petitioner's claim or claims for relief shall be limited to evidence of the allegations of fact in the petition.

(d) All evidentiary hearings shall be recorded.

§ 40-30-111. Final disposition of petitions.--(a) If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, the court shall vacate and set aside the judgment or order a delayed appeal as hereinafter provided and shall enter an appropriate order and any supplementary orders that may be necessary and proper. Costs shall be taxed as in criminal cases.

(b) Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground.

(c) Where the petitioner has court-appointed counsel, the court may require petitioner's counsel to file a verified statement of dates and times he has consulted with petitioner and this statement shall become a part of the record.

(d) In capital cases, final disposition shall be made within one (1) year of the filing of the petition. Such deadline shall not be extended by agreement. Such deadline may be extended only by order of the trial court based upon a finding that unforeseeable circumstances render a continuance a manifest necessity. Such extension shall not exceed thirty (30) days.

§ 40-30-112. Enforcement of trial court's duty.--If the court fails to comply with the time requirement imposed in Tennessee Code Annotated, § 40-30-111(d), any party may file a motion to enforce compliance with the Supreme Court, setting out the facts said to constitute a failure to comply with the duties set out in this section. The party shall serve a copy of the motion upon the trial court by mailing a copy to the trial court clerk. The trial court and any opposing party may file and serve a written response upon the Supreme Court and the parties within seven (7) days of service by the moving party. If the Supreme Court finds that the provisions have not been complied with, it shall enter an order setting a reasonable time within which the trial court must finally dispose of the petition. The Supreme Court, or a single justice

thereof, shall act upon such motion within fourteen (14) days from the date of the filing of the motion.

§ 40-30-113. Notice of final judgments by clerk of court.--The clerk of the court shall send a copy of the final judgment to the petitioner, the petitioner's counsel of record, any authority imposing restraint on the petitioner and the attorney general and reporter at Nashville.

§ 40-30-114. Petitioner unconstitutionally denied appeal--Procedure.--(a) When the trial judge conducting a hearing pursuant to this chapter finds that the petitioner was denied his right to an appeal from his original conviction in violation of the Constitution of the United States or the Constitution of Tennessee and that there is an adequate record of the original trial proceeding available for such review, the judge can:

- (1) If a transcript was filed, grant a delayed appeal;
- (2) If, in the original proceedings, a motion for a new trial was filed and overruled but no transcript was filed, authorize the filing of the transcript in the convicting court; or
- (3) If no motion for a new trial was filed in the original proceeding, authorize such motion to be made before the original trial court within thirty (30) days. Such motion shall be disposed of by the original trial court as if the motion had been filed under authority of Rule 59 of the Rules of Civil Procedure.

(b) An order granting proceedings for a delayed appeal shall be deemed the final judgment for purposes of review. If either party does appeal, the time limits provided in this section shall be computed from the date the clerk of the trial court receives the order of the appellate court determining the appeal.

(c) The judge of the court which sentenced a prisoner who has sought and obtained relief from that sentence by any procedure in a federal court is likewise empowered to grant the relief provided in this section.

§ 40-30-115. Reimbursement of expenses of district attorney general--Duty of attorney general & reporter.--(a) The district attorney general shall be reimbursed for any

expenses including travel incurred in connection with the preparation and trial of any proceeding under this chapter. This expense shall be paid by the state of Tennessee, and shall not be included in the expense allowance now received by the various district attorneys general.

(b) (1) It is the duty and function of the attorney general and reporter, and his staff, to lend whatever assistance may be necessary to the district attorney general in the trial and disposition of such cases.

(2) In the event an appeal is taken or a delayed appeal in the nature of a writ of error is granted, the attorney general and reporter, and his staff, shall represent the state and prepare and file all necessary briefs in the same manner as now performed in connection with criminal appeals.

§ 40-30-116. Determination of indigency--Appointment of counsel and court reporters.-- Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by Chapter 14, Parts 2 and 3 of this title.

§ 40-30-117. Appeal after final judgment.-- The order granting or denying relief under the provisions of this chapter shall be deemed a final judgment, and an appeal may be taken to the court of criminal appeals in the manner prescribed by the Tennessee Rules of Appellate Procedure.

§ 40-30-118. Promulgation of rules.--(a) The supreme court may promulgate rules of practice and procedure consistent with this chapter, including rules prescribing the form and contents of the petition, the preparation and filing of the record and assignments of error for simple appeal and for delayed appeal in the nature of a writ of error and may make petition forms available for use by petitioners.

(b) In order to ensure the appointment of competent counsel in capital cases brought under this chapter, the Tennessee Supreme Court shall promulgate rules which facilitate the

participation of the public defenders in capital cases brought under this chapter, including the creation and staffing of a unit specifically designed to handle such cases.

§ 40-30-119. Bail during new trial or delayed appeal--Exception.-- When a new trial or delayed appeal is granted, release on bail shall be discretionary with the trial judge pending further proceedings. In all other cases the petitioner shall not be entitled to bail.

§ 40-30-120. Stays of execution when petitioner is under sentence of death.--(a)
When affirming a conviction and sentence of death on direct appeal, the Tennessee Supreme Court shall contemporaneously set a date for an execution. Such date shall be no less than six (6) months from the date of the judgment of the Tennessee Supreme Court. Upon the filing of a petition for post-conviction relief, the court in which the conviction occurred shall issue a stay of the execution date which shall continue in effect for the duration of any appeals or until the post-conviction action is otherwise final. The execution date shall not be stayed prior to the filing of a petition for post-conviction relief except upon a showing by the petitioner that he is unable to file a petition prior to the execution date and that such inability is justified by extraordinary circumstances beyond his control.

(b) Where the petitioner is under a sentence of death and the petition is not the first petition under this chapter attacking that judgment, no court may stay the execution unless the petition has been filed within the time required by § 40-30-102 with a court of competent jurisdiction and:

(1) The basis for the stay and request for relief is a claim not previously presented in the state or federal courts; or

(2) The failure to raise the claim is:

(A) the result of attorney error at the original trial or on direct appeal rising to the level of ineffective assistance of counsel;

(B) the result of the recognition by the Tennessee Supreme Court or the Supreme Court of the United States of a new state or federal constitutional right, respectively, that is retroactively applicable under the provision of § 40-30-104; or

(C) the result of state action in violation of the federal or state constitution; and

(3) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed.

(c) The mere satisfaction of the requirements of subsection (b) shall not automatically result in a stay. In order to obtain a stay, an applicant must show that upon the court's consideration of the petition there is a significant possibility that the death sentence will be invalidated and that there is a significant possibility that the death sentence will be carried out before consideration of the petition is concluded.

(d) Any motion for stay pending consideration of the post-conviction petition must be presented first to the court where the petition is filed. The decision of the court shall be reviewable by the court of criminal appeals upon the filing of a motion for review. Either party may seek review. The lower court's determination shall not be set aside unless the movant demonstrates an abuse of discretion. The action of the court of criminal appeals shall likewise be reviewable upon the filing of a motion for review in the Tennessee Supreme Court. Either party may seek review. The determination of the court of criminal appeals shall not be set aside unless the movant demonstrates an abuse of discretion.

(e) Each motion for stay, or motion for review, shall be filed in writing with the clerk of the court to whom the motion is directed. The clerk shall immediately refer the matter to the court. Each motion shall be served upon opposing counsel in the most expeditious manner practicable. The motion shall recite that opposing counsel has been served and in what manner. Oral requests directed to a judge are prohibited unless, owing to emergency circumstances, the

filing of a written motion is impractical. In such event, counsel initiating such contact shall orally notify opposing counsel prior to any such contact.

(f) Motions for review may be acted upon by a single judge of the appellate court. Such judge may, in lieu thereof, refer the motion to the court. In the court of criminal appeals, such reference will be to a three (3) judge panel of the court in the grand division where the motion is filed. Review shall be made promptly within five (5) days or within such shorter period as necessary to preclude the issue from becoming moot, whether by a single judge or by the court. Oral argument shall not be permitted unless the court otherwise directs. Opposing counsel shall have a right to file a written response to the motion within three (3) days of the service of the motion. If time does not permit the filing of a written response, the court shall ascertain the position of opposing counsel by other means which may include a telephone conference. The court may consider the last-minute nature of an application to stay execution by resolving against the petitioner any doubts and uncertainties as to the sufficiency of his submission.

SECTION 2. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it and shall apply to any petitions filed on or after that date.